Yusmarin bin Samsudin v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-05-49 OF 1997

GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA

20 AUGUST 1999

Criminal Procedure *— Sentence — Dangerous drugs, possession of — First offender — Severity of offence — Whether 18 years imprisonment and 12 strokes of rotan appropriate — Dangerous Drugs Act 1952 s 39A(2)(f)*

The appellant was convicted for trafficking in 2,863.1 grams of cannabis and sentenced to death. He appealed against both conviction and sentence. By way of mitigation, it was submitted that the appellant was only 29 years old at the time he committed the offence and that he was a first offender.

Held, allowing the appellant's appeal against conviction, substituting it to that of being in possession of the dangerous drug and sentencing him to 18 years imprisonment and 12 strokes of the rotan:

(1) The trial judge had misdirected himself when he ruled that trafficking had been proved. The prosecution evidence merely supports the lesser offence for possession as the presence of the drug in the car, per se, as in this case, cannot amount to trafficking (see p 627B–C).

(2) Under s 39A(2)(f) of the Dangerous Drugs Act 1952, the maximum punishment upon conviction is life and the minimum is not less than five years and whipping of not less than 10 strokes is mandatory. The severity of the sentence can only be to reflect Parliament's intention that conviction for being in possession of a large amount of any form of prohibited drugs must commensurate with the sentence to be passed based on the peculiar facts of each case. The substantial amount of cannabis found in the appellant's possession must be reflected in the sentence and public interest dictates that he should be severely punished as a deterrent to others who may be minded to behave like him (see pp 627G–628A).

[Bahasa Malaysia summary

Perayu telah disabitkan kerana mengedar 2,863.1 gram kanabis dan dihukum mati. Beliau merayu terhadap kedua-dua sabitan dan hukuman. Di dalam mitigasi, adalah dihujahkan bahawa perayu hanya berumur 29 tahun pada masa beliau melakukan kesalahan itu dan beliau merupakan pesalah kali pertama.

Diputuskan, membenarkan rayuan perayu terhadap sabitan, menggantikannya kepada memiliki dadah berbahaya dan menghukum beliau selama 18 tahun penjara dan 12 kali rotan:

(1) Hakim perbicaraan telah tersalah arah apabila beliau mengarahkan bahawa pengedaran telah dibuktikan. Keterangan pendakwaan yang hanya menyokong kesalahan yang ringan untuk milikan oleh kerana kehadiran dadah di dalam kereta itu, semata-mata, sepertimana di dalam kes ini, tidak terjumlah kepada kesalahan mengedar dadah (lihat ms 627B–C).

(2) Di bawah s 39A(2)(f) Akta Dadah Berbahaya 1952, hukuman maksima selepas sabitan adalah seumur hidup dan yang minima tidak kurang daripada lima tahun dan sebatan tidak kurang daripada 10 sebatan adalah mandatori. Hukuman keras ini membayangkan tujuan Parlimen bahawa sabitan kepada milikan dadah untuk jumlah yang besar dalam sebarang bentuk dadah yang dilarang mestilah setimpal dengan hukuman yang dijatuhkan berdasarkan fakta-fakta khusus setiap kes. Jumlah besar kanabis yang dijumpai di dalam milikan perayu seharusnya dibayangkan di dalam hukuman dan kepentingan awam memastikan bahawa beliau sepatutnya dihukum dengan keras sebagai satu pencegahan kepada yang lain yang mungkin berfikir untuk bertindak seperti beliau (lihat ms 627G–628A).]

Notes

For cases on sentencing for possession of dangerous drugs, see 5 *Mallal's Digest* (4h Ed, 1997 Reissue) paras 2650–2653.

Cases referred to

Lim Guan Eng v PP [1998] 3 MLJ 14 (refd)
PP v Lin Lian Chen [1991] 1 MLJ 361; [1992] 2 MLJ 561 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(da)(vi), 39A(2)(f), 39B(1)(a), (2)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Mohd Hanafiah bin Zakaria (Deputy Public Prosecutor) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): In the High Court, the appellant was tried and convicted for trafficking in 2,863.1 grams of cannabis, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under sub-s (2) of the same section.

A Before us, he appealed against both his conviction and sentence. The undisputed evidence showed that the offending drug was found in four plastic packages that were placed in an unlocked black bag and that black bag was found unconcealed on the back seat of the car driven by the appellant. The car belonged to the appellant's father but he was alone when the car was stopped and searched by the police.

B In the light of such circumstantial evidence, we had found that the trial judge had misdirected himself when he ruled that trafficking had been proved. On the contrary, we consider that the prosecution evidence merely supports the lesser offence for possession, a finding that En Mohd Hanafiah bin Zakaria, learned deputy public prosecutor for the respondent was C prepared to accept as the presence of the drug in the car, per se, cannot amount to trafficking. See the case of *PP v Lin Lian Chen* [1991] 1 MLJ 361; [1992] 2 MLJ 561 (SC).

It was under those circumstances that we had allowed the appellant's appeal against his conviction for trafficking and substituted it to that of D being in possession of the dangerous drug under s 12(2) of the Act, and sentenced him to 18 years imprisonment to take effect from the date of his arrest and 12 strokes of the rotan under s 39A(2)(f) of the Act.

As the appellant is dissatisfied with the sentence that we had passed on him, this judgment is confined to the reasons why we consider the term of imprisonment and the number of the strokes we had ordered to be just and E appropriate.

The principles of sentencing have long been entrenched and well settled in our criminal law jurisprudence and a court seized with such a jurisdiction is empowered to take into account the following considerations:

F (1) the extent and seriousness of the offence committed;

(2) the guilty person's antecedents; and

(3) the public interest factor.

See the judgment of this court in *Lim Guan Eng v PP* [1998] 3 MLJ 14.

G Mr Karpal Singh, counsel for the appellant conceded that the amount of cannabis found in the appellant's possession is very large. By way of mitigation, he drew our attention to the fact that the appellant was only 29 years old at the time he committed the offence on 14 June 1996 and that he was a first offender.

Under s 39A(2)(f) of the Act, the maximum punishment upon H conviction is life and the minimum is not less than five years and whipping of not less than 10 strokes is mandatory. The severity of the sentence can only be to reflect Parliament's intention that conviction for being in possession of a large amount of any form of prohibited drugs must commensurate with the sentence to be passed based on the peculiar facts of each case. In this connection, the appellant was found to be in possession I of 2,863.1 grams of cannabis which is 14 times the permitted limit for the presumption of trafficking to arise under s 37(da)(vi) of the Act. Fortunately for the appellant, the ingredients of the offence of trafficking

could not be proven against him. Nevertheless, we consider that the substantial amount of cannabis found in his possession must be reflected in the sentence and public interest dictates that he should be severely punished as a deterrent to others who may be minded to behave like him. On that very paramount consideration, we consider a term of 18 years and 12 strokes to be a just and appropriate sentence to be imposed on the appellant.

Appeal against conviction allowed. Appellant convicted of being in possession of dangerous drug and sentenced to 18 years imprisonment and 12 strokes of the rotan.

Reported by Loo Lai Mee